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No. 87-444

In the

Supreme Court of the United States

October Term, 1987

RICHARD L. SMEGAL, MARVIN A. ROGERS, and RODNEY W. BOMSTAD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GATEWAY FOODS OF MINNEAPOLIS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, NATIONAL SUPER MARKETS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Over-the-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local No. 544, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 819 F.2d 191 (8th Cir. 1987).

STATEMENT OF THE CASE

This Respondent substantially agrees with Petitioners' Statement of the Case (Pet. 3–8) except for the inaccurate summary of the Eighth Circuit's decision that Petitioners ask this Court to review. The majority panel opinion did not, as petitioners state (Pet. 8), "conclud[e] that 'substantial continuity requires that predecessor's employees constitute a majority of the successor's workforce.'" The majority simply affirmed the district court's conclusion that Gateway was not a successor employer, based on the majority's concurrence in the district court's evaluation of appropriate and adequate factors, other than the continuity of the work force. These factors, the court held, "demonstrated that there is no substantial continuity between the Gateway and National operations." (Pet. A-7)

Moreover, Petitioners contend in their Statement of the Case (Pet. 8) that the concurring opinion, in finding that there was no Union breach of its duty of fair representation, "inexplicably" ignored an earlier decision in the same matter, *Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354 (8th Cir. 1985) *("Smegal I")*, where the Eighth Circuit remanded to the district court for a determination on the successorship issue. This is an inaccurate characterization of the concurring opinion. The *Smegal I* court in remanding, merely said that "it cannot be said as a matter of law" that Gateway was not a successor employer at the summary judgment stage of the proceedings. *Id.* at 360. On remand the successorship issue was fully considered on the merits pursuant to stipulated facts, briefs and oral argument.

Finally, Petitioners' statement that the Union "did nothing" about Petitioners' grievance after it was rejected by Gateway (Pet. 6), must be corrected. The Union duly considered the merits of the grievants' successorship claim and decided that it should not be further pursued to arbitration.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not raise the Question Presented in the Petition.

The sole Question Presented in the Petition (p. i) is whether it is proper in a § 301 successorship case to apply "a fixed rule that there can be no successorship unless the predecessor's employees constitute a majority of the successor's work force." But the Eighth Circuit did not decide that question in this proceeding. The court did not rule that work force continuity turned on whether a majority of the successor's employees were those of the predecessor. Instead, the court did not adopt any rule on how to determine work force continuity, holding that the specific facts of this case compelled it to sustain the trial court's correct analysis and application of other appropriate successorship factors.

In its opinion (Pet. A-1 to A-9), the majority of the Eighth Circuit panel correctly noted that the basic consideration in determining successorship status is whether there is "substantial continuity between the new operation and the old, particularly with regard to the employees." (Pet. A-5) *See John Wiley & Sons, Inc., v. Livingston,* 376 U.S. 543, 551 (1964). Whether there is "substantial continuity" of business operations between enterprises depends upon a number of factors, including:

> . . . whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. ____, 107 S.Ct. 2225, 2236 (1987). Another important factor in determining successorship is "whether there exists substantial continuity of identity in the work force across the change in ownership." *Service, Hospital, Nursing Home and Public*

Employees' Union Local 47 v. Cleveland Tower Hotel, Inc., 606 F.2d 684, 687 (6th Cir. 1979). The successorship inquiry is, in all cases, "primarily factual in nature and is based on the totality of the circumstances in a given situation." *Fall River, supra,* 107 S.Ct. at 2236.

The continuity of the work force question, only one of many successorship considerations, depends upon the definition of "majority" employed by the decision maker. In its decision, the Eighth Circuit simply discussed the present status of "majority" determination law. The Eighth Circuit did not, however, adopt a specific formulation for determining work force continuity when it affirmed the district court's conclusion that Gateway is not a successor to National.

The court states that it previously has "not ruled directly on which test is to be used when a § 301 charge is involved" (Pet. A-6); and does not decide that question in this case either. The court merely points out that there is no Eighth Circuit precedent supporting the definition of "majority of employees" proposed by the Petitioners, *id.*, and then makes it clear that regardless of how the district court analyzed the continuity of the work force factor, its opinion must be affirmed: "Even if the appellants' definition of the majority test were accepted by the panel, the remaining factors used to evaluate substantial continuity support the district court's decision." (Pet. A-7) The court then reviews these other factors in light of the evidence and finds that "[o]n the whole, the weight of these factors suggests that Gateway is not a successor employer." *Id.* The court's analysis and conclusion were proper in all respects.

Whether an employer is a "successor" depends upon the legal and factual contexts in which the issue arises. "There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words may be a successor for some purposes and not for others." *Howard Johnson Co. v. Detroit Local Executive Board, Hotel & Restaurant Employees and Bartenders International Union, supra,* 417 U.S. 249, 262, n. 9 (1974). Therefore, "in light of the diffi-

culty of the successorship question, the myriad factual circumstances and legal context in which it can arise and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Id.* at 256.

The circuit court examined the district court's findings of fact under the appropriate "clearly erroneous" standard of review. *Jorgensen v. Modern Woodmen of America,* 761 F.2d 502 (8th Cir. 1985); Fed. R. Civ. P. 52(a). It noted that the matter must be considered, as the trial court did, in light of national labor policy and the rights and interests of the parties, as well as the facts. The court explicitly, and implicitly through approval of the district court's decision, performed the required analysis suggested by *Howard Johnson, supra,* 417 U.S. at 262, n. 9.

Because the decision of the Eighth Circuit turns solely upon its consideration of the particular and unique facts involved in this dispute rather than upon the Question Presented by the Petitioners, certiorari should not be granted. This Court does not grant certiorari to review evidence and discuss specific facts, *e.g., United States v. Johnston,* 268 U.S. 220, 227 (1925), especially where, as here, the court of appeals has affirmed the factual findings of the district court. *See Rogers v. Lodge,* 458 U.S. 613, 623 (1982).

The Eighth Circuit's decision simply does not provide an appropriate vehicle for deciding the Question Presented by Petitioners. Moreover, Petitioners acknowledge this in the footnote to their overly narrow and incorrectly stated Question Presented (Pet. i, bottom of page). Petitioners state, "If the instant petition is granted, petitioners intend to raise an additional question: Must the parties' stipulation of facts on the **other** factors customarily involved in successorship determinations be given effect?" That statement betrays Petitioners' own recognition that the Eighth Circuit's decision was based on adequate factual determinations and grounds independent of the Question Presented in the petition. The court of appeals did not hold any continuity of work force test applicable in § 301 actions, nor

was such a holding implicit in the result. Because the Eighth Circuit's decision clearly was premised on other relevant, appropriate and adequate factual determinations, this case simply does not raise the Question Presented by Petitioners.

2. The decision below involved a determination of successorship in a specific factual situation involving a breach of fair representation claim and therefore does not provide an appropriate context in which to decide the Question Presented.

Petitioners argue that certiorari should be granted because of conflicting decisions by this Court and other circuits on the appropriate test for analyzing work force continuity. Petitioners strenuously argue at the same time, however, that this Court has not yet clearly decided the meaning of work force continuity in § 301 actions, and that its guidance is needed on that question. Even if this proposition is accepted, this case is not an appropriate one for definitively deciding the issue.

As the concurring opinion suggests (Pet. A-8), in this case the ultimate issue is "whether the Union violated its duty of fair representation." *Id.* In this duty-of-fair-representation case, the issue of successorship is important primarily as it relates to the Union's decision not to pursue Petitioners' grievance based on the theory that Gateway was a successor to their former employer National. Successorship itself is therefore the *sine qua non* of Petitioners' action. The concurring opinion author recognizes this in stating that "[w]hatever the merits of the question of successorship. . . I am persuaded that it is, as a matter of law, close enough to justify the Union's decision not to pursue a grievance based on a successorship theory." (Pet. A-8 to A-9)

This analysis is not in conflict with *Smegal I,* as Petitioners suggest (Pet. 8). *Smegal* I held that the successorship issue could not be determined as a matter of law at the summary judgment stage. The concurring opinion's analysis in *Smegal II* occurred

after the merits of the successorship issue had been heard, tried and determined on the facts and law. Nothing in *Smegal I* prohibits the concurring opinion's conclusions after trial on the merits of the successorship issue that the Union did not violate its duty of fair representation.

CONCLUSION

For these reasons, the Petition for a Writ of certiorari should be denied.

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The Respondent, Gateway Foods of Minneapolis, Inc., respectfully opposes the Petition of Petitioners Richard L. Smegal, Marvin A. Rogers and Rodney W. Bomstad for a Writ of Certiorari and herewith submits this Brief in opposition.

COUNTER-STATEMENT OF THE CASE

Respondent, Gateway Foods of Minneapolis, Inc. (Gateway), takes no exception to the Statement of the Case of Petitioners but believes that certain additional facts which appear of record should be presented for consideration.

Those former employees of National who were hired by Gateway were required to fill out employment applications with Gateway and to submit to the Gateway pre-employment physical examination. (Bomstad Dep. at p. 32, Stip. Exh. H, para. 2) Some of the National Employees failed the Gateway physical and were rejected for employment. Gateway relented after the union filed a grievance over this issue and hired those employees. (Bomstad Dep. at p. 35)

The nature of the Gateway operation following the transaction was significantly different from the National operation prior to the transaction. Thus, both before and after the transaction, Gateway was a large scale food wholesaler engaged in the sale and distribution of groceries and related products to retail outlets at large and did not own such outlets of its own. National was a completely integrated retail grocery business with a subsidiary storage and distribution operation. Following the transaction, National remained in the retail grocery business, but relied upon Gateway and others for its supplies. (Stip. paras. 2 and 3, Exh. P)

Prior to the transaction between Gateway and National, the affected employees of Gateway and National respectively were separate appropriate bargaining units for purposes of the National Labor Relations Act. Following the transaction, the combined work forces of Gateway and National were a single appropriate bargaining unit and the former employees of National separately would not constitute a separate appropriate bargaining unit for purposes of the National Labor Relations Act.

BEST AVA

SUMMARY OF ARGUMENT

I. The District and Circuit Courts Correctly Interpreted and Applied Existing Case Law to the Facts Before Them.

In approaching the successorship question both the District Court and the Circuit Court of Appeals recognized that the issues in a successorship are to be resolved on a "case by case" basis. At both levels the Court proceeded to review the facts of record, and determined that on the basis of all facts presented, there was not sufficient continuity to find successorship. Thus, neither Court applied a "fixed rule" but simply weighed all factors before it. It is true that continuity of employment is a significant factor and in both the District Court and Circuit Court opinions the issue was disposed of adversely to Petitioners. The District Court, however, then proceeded to examine all other factors relevant to continuity and found that the consolidation of functions and change in the nature of the overall business militated against a finding of successorship. The Court noted that the similarity of machinery equipment and production methods was not of such magnitude to be controlling.

The analysis by the Circuit Court was to the same effect. Thus the Court states

> Even if the Appellants' definition of the majority test were accepted by the panel, the remaining factors used to evaluate substantial continuity support the District Court's decision. (A-7)

The Court went on to examine the seven factors bearing on successorship and found that there was insufficient factual continuity to find successorship.

Thus, at both levels below, there has been an analysis of all facts resulting in the same conclusion that there is insufficient continuity to establish successorship. Gateway respectfully sub-

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mits that there is no need for any further analysis of this same question.

As this Court has emphasized, there is "no single definition of successor" and that cases of this nature are to be handled on a "case by case" basis. *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 256 (1974). This is precisely the approach utilized by the Courts below.

It is true as Petitioners point out that one of the continuities significant in the analysis of the successorship issue is the question of continuity of employment. It is also true as Petitioners point out that there has been some confusion as to whether that continuity is to be measured according to whether the purchaser acquires a majority of the seller's workforce or whether the seller's workforce constitutes a majority of the purchaser's work force. The confusion may be traced to a reference by this Court in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra,* to the facts in the case before it that the alleged successor did not acquire a majority of the predecessor's employees. Subsequently, this Court in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972) made clear that for purposes of the refusal to bargain context, the question of continuity was to be measured upon whether the predecessor's employees constituted a majority of the successor's workforce. Later Circuit Court opinions have rejected a contention that this Court in *Howard Johnson* intended to pronounce a specific rule. Thus, in *Saks and Company v. NLRB,* 634 F.2d 682 (1980), the Second Circuit referenced the *Howard Johnson* decision on this point stating:

> This language does not conclusively establish which majority was intended nor do the sources cited in the supporting footnote which include at least one case and one law review comment clearly rejecting the majority of the predecessor bargaining unit test.

Id. at fn. 3. Likewise, in *Boeing Company v. International Association of Machinists,* 504 F.2d 307 (1974), the Fifth

Circuit stated with regard to this issue: "As we have already expressed, we do not find that the Supreme Court has established any benchmark." 504 F.2d at 320. Although the Court there adopted the majority of the predecessor's bargaining unit as the test, it went on to state in footnote 19:

> Our conclusion as to which ratio is more significant in determining whether a successor is obligated to arbitrate does not of course preclude all consideration of the other ratio. For example, an arbitrator may consider that the workforce of an absorbed enterprise has been diffused in such a way as to preclude the application.

It has been the contention of Gateway throughout this litigation that the correct test for successorship in all cases is whether a majority of the successor's employees are made up of predecessor employees. It has also been the position of Gateway that if this question is answered in the negative there may be no successorship. Had the Circuit Court so ruled herein, the issue would be presented in the context suggested by the Petitioners. However, the Circuit Court did not so rule. As noted above, both the District and Circuit Courts regarded the majority question as only one of the continuity factors to be considered. Both Courts decided that on the record as a whole and considering the matter on a case by case basis that successorship was not demonstrated. Wholly apart from the majority formulation issue, therefore, the case is in a posture of having applied previously enunciated standards which require no further explication. It can be seen therefore that Petitioners in attempting to present this case as a pure issue of the correct majority formulation are in reality only attempting to quarrel with the factual analyses made by the Circuit and District Courts. This is not a Supreme Court issue.

II. The Lack of a Breach by the Union of its Duty of Fair Representation is a Proper Consideration Herein.

In a separate concurring opinion, Circuit Judge Arnold expressed doubts about the correct manner of formulating the question of employment continuity and suggested that a conflict between the Circuits was being unnecessarily created. Significantly, Judge Arnold did not conclusively rule upon the question of which formulation was appropriate and did not dissent from the majority's determination that the other continuities applicable to successorship were not present. Judge Arnold did however conclude that the issue did not need to be resolved stating:

> Whatever the merits of the question of successorship, I am persuaded that it is **as a matter of law** close enough to justify the union's decision not to pursue a grievance based on a successorship theory. (A-8, emphasis supplied)

Petitioners refer to this opinion as "inexplicably ignoring the earlier decision in Smegal I." (Brief, p. 8) This is no doubt a reference to the fact that the Circuit Court of Appeals in a prior appeal had held that summary judgment in favor of the Defendants on the duty of fair representation issue was inappropriate because there was sufficient evidence upon which a jury could find that the union's refusal to process the successorship grievance was perfunctory and arbitrary. It is respectfully submitted that Judge Arnold's concurring opinion is not inconsistent with Smegal I and was a proper consideration. The Court in Smegal I clearly offered no opinion on whether there was a successorship and left that issue for futher proceedings. The Circuit Court did not hold or suggest that upon remand the case after trial must be permitted to go to the jury on the question of the duty of fair representation, but merely held that summary judgment was inappropriate. Clearly, after trial, a district judge would have had the power to determine whether the issue should or should not be allowed to go to

the jury. One factor in evaluating whether a union has breached its duty of fair representation is the closeness of the legal question upon which it was required to act. *Lewis v. Greyhound Lines-East,* 555 F.2d 1053 (D.C. Cir. 1977). Stated another way, a district judge after hearing the evidence on successorship could have concluded that the issue was sufficiently close as to resolve the duty of fair representation issue in favor of the union and require a directed verdict. Since the successorship issue was fully submitted on a fact stipulation, the Circuit Court could reach the same result. The emphasized portion of the above quotation shows that this was precisely Judge Arnold's reasoning.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully Submitted,

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QUESTION PRESENTED

In a §301 successorship case involving the effect of a business transfer on the *contractual* rights of the acquired employees, is the "require[d] analysis" of *Howard Johnson*, 417 U.S. 249, 262 n. 9 (1974), satisfied by applying a fixed rule that there can be no successorship unless "the predecessor's employees constitute a majority of the successor's workforce"?*

---

*If the instant petition is granted, petitioners intend to raise an additional question: Must the parties' stipulation of facts on the *other* factors customarily involved in successorship determinations be given effect?

PARTIES TO THE PROCEEDING

The parties to the proceeding are as named in the caption.

We have omitted in the caption the third-party proceeding initiated by Gateway Foods against National Super Markets.

There has been, as yet, no determination whether this action may be maintained as a class action.

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Petitioners,

v.

GATEWAY FOODS OF MINNEAPOLIS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, NATIONAL SUPER MARKETS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Richard L. Smegal, Marvin A. Rogers and Rodney W. Bomstad, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on May 21, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. A2-A9), as ıended (Pet.App. A11-A12), is reported at 819 F.2d 191. ıe memorandum and order of the District Court (Pet.App. 13-A22) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet.App. A1) was tered on May 21, 1987. A timely petition for rehearing ıs denied on June 19, 1987 (Pet.App A10). This petition · certiorari was filed within 90 days of that date. This ıurt has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 47, as amended, 29 U.S.C. §185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

The parties' stipulation of facts on the successorship issue appears *infra* at Pet.App. A23-A36.[1]

In June 1981 respondent IBT Local 544 (Union) had collective bargaining agreements with two different employers: National Super Markets (National), covering 137 employees working at its Hopkins, Minnesota wholesale food distribution warehouse; and Gateway Foods of Minneapolis (Gateway), covering 135 employees working at its two Minneapolis wholesale food distribution warehouses. National's Hopkins facility serviced sixty-four supermarkets owned by National in Minnesota and Wisconsin; Gateway's warehouses serviced some five hundred stores throughout Minnesota and western Wisconsin, ranging from small family-owned outlets to supermarkets (including some National stores).

The National and Gateway contracts with the Union, although separate, contained virtually identical economic provisions— "the pay scale and the benefits were the same." [Aldrich Dep. 36] The National-Union contracts (a master agreement and local addenda) expired on June 12, 1982 and May 29, 1982 respectively. The Gateway-Union contract expired May 29, 1982.

Petitioners worked for National at its Hopkins facility. Their collective bargaining agreement contained grievance and arbitration, subcontracting, and successors and assigns provisions which bound any purchaser or transferee to the terms of the National-Union contract. It also provided they would lose their seniority only by discharge, voluntary quit, or more than a one-year layoff.

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[1]No record references are given here for facts contained in the stipulation and exhibits described therein. Bracketed references are given for non-stipulated facts.

On June 23, 1981, after negotiations to which the Union was not privy, Gateway and National executed a series of agreements whereby (1) Gateway purchased from National the Hopkins' inventory, fixtures and equipment for $5,100,000; (2) Gateway undertook to service the sixty-four National supermarkets, and in doing so agreed to employ former National/Hopkins employees by their seniority, as needed, to perform "National's business"; (3) Gateway subleased the warehouse facility; and (4) Gateway acquired a right of first refusal to purchase the National supermarkets (a right it later exercised). National agreed to indemnify Gateway against any liability arising from claims of adversely affected employees. All these undertakings were contingent upon Gateway reaching a "satisfactory agreement" with the Union which explicitly provided that any National/Hopkins employee hired by Gateway would be considered a new employee, would have no seniority at Gateway, would not be given credit for prior service with National, and would be covered under the existing Gateway-Union labor agreement.

By July 6, 1981, the Union and Gateway executed a transition agreement which, in essence, provided for Gateway's hiring of National/Hopkins employees by their seniority, as needed, as new employees of Gateway, working at reduced wages and benefits, and being "endtailed" behind all Gateway employees.

National never discharged or laid off any Hopkins employee. [Bomstad Dep. 34-35; Costello Dep. 46-49]

Gateway's takeover of the Hopkins warehousing and distribution functions was phased in between July 9 and

August 24, 1981.[2] Gateway hired 113 out of a possible group of 127 National employees.[3] Fourteen of the 127 National employees did not report for available jobs at Gateway. Gateway's Aldrich testified that the work force engaged by Gateway from the old National group was "substantially similar". There was no hiatus or lapse in production by the ex-National employees prior to or after their employment by Gateway. The supervisory staff remained substantially the same, with Gateway hiring all of the 8-10 National supervisors, one of whom was ultimately let go. There was no change in the nature of services rendered or job classifications of the National employees after their employment by Gateway. There was no substantial variation in the equipment used by the ex-National employees for Gateway. With respect to changes in method of operation, after July 9, 1981, Gateway consolidated certain functions formerly performed at Hopkins and Minneapolis to avoid duplication; specifically, fresh meat and produce were combined at the Hopkins location, and certain dry grocery items were combined at the Minneapolis location. Regarding customers served, some independent stores previously serviced by Gateway/Minneapolis were serviced out of Hopkins (in addition to the National stores); the quantum of work for the independents did not amount to more than 5-15%. There was no substantial change in the identity of suppliers to the warehouse. There was no change in the identity of the union representative. As to work location, after July 9, 1981

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[2]The phrase "August of 1982" appearing in the advance sheet of the reported decision, 819 F.2d at 193, is incorrect. See order amending original opinion at Pet.App. A11.

[3]Ten of the 137 National employees at Hopkins, represented by the Union, worked in a bakery classification which was not covered by the National-Gateway service agreement. When National closed its bakery operation in October 1982, these employees dovetailed in to the ex-National warehouse complement employed by Gateway.

the more senior ex-National employees remained at Hopkins, the less senior being assigned to work at Gateway's Minneapolis warehouses. One year later, as of July 9, 1982, 27 National/Hopkins warehousemen had been assigned to Minneapolis; 42 remained at Hopkins. The truck drivers were not considered domiciled [any longer] at either Hopkins or Minneapolis, but commenced their work from either facility depending on the direction of their trip. At no time did the ex-National employees hired by Gateway comprise a majority of Gateway's aggregated, post-takeover bargaining unit with the Union.

Gateway's post-takeover sales to the National stores, serviced essentially by the Hopkins facility, amounted to 54-61% of Gateway's total sales to all of its customers.

In August 1981 petitioner Smegal filed a class action grievance asserting Gateway was a successor to National's operation of its Hopkins food distribution warehouse, and was bound by the terms of the extant National-Union contract. Gateway rejected the grievance. The Union did nothing about it. [Huemoeller Dep. 52; Smegal Dep. 77-80] In December 1981 petitioners sued the Union for breach of its duty of fair representation, and Gateway for breach of contract.

Gateway operated the Hopkins facility continuously from its takeover in July 1981 until October 1982, when an earlier PCB oil spill caused termination of operations there and the reassignment of all employees to one or the other of its two Minneapolis warehouses. Thereafter, the diminished seniority of the ex-National employees exposed them to layoffs by Gateway to the extent that as of April 1983 not a single ex-National employee was working for Gateway. [Smegal Affid. dated 5/12/83, pp. 1-2, D.Ct. Clerk's Docket Entry item #54; Aldrich Dep. 18, 24]

In July 1983 the District Court granted respondents summary judgment on the grounds there was no breach by the Union of its duty of fair representation. The Court of Appeals reversed, *Smegal v. Gateway Foods of Minneapolis*, 763 F.2d 354, 360 (8th Cir. 1985) ("Smegal I"), holding:

> "We conclude that the evidence would support a jury finding that the Union's treatment of Smegal's successorship grievance was perfunctory, and therefore arbitrary. We by no means decide that Gateway was a successor, but it cannot be said as a matter of law that it was not.
>
> "Accordingly, the judgment on the contract claim based on alleged successorship must be reversed."

On remand the issues of successorship and consequences of successorship were submitted to the District Court. In September 1986, on stipulated facts with no testimony, it held that Gateway was not a successor to National's operation of its Hopkins food distribution warehouse because (1) there was no "substantial continuity in the work force"; (2) "no substantial continuity exists between the two business operations"; (3) "Gateway did not use the same plant as National for a substantial proportion of the former National employees"; (4) "no substantial similarity of working conditions exists"; (5) "there was no significant carryover of managerial and supervisory authority"; and (6) "Gateway offered substantially different services than National." Pet.App. A13-A22, *infra*. The court considered the question of workforce continuity as the key factor in its determination, and did not reach or decide the issue of consequences of successorship. *Ibid.*

On appeal, the Eighth Circuit affirmed, holding Gateway was not a successor to National's operation of its Hopkins

facility, and similarly not reaching the consequences issue (whether Gateway was obliged to honor the terms of the National-Union contract from its July 1981 takeover to the expiration of that contract in May/June 1982). A panel majority rejected the test of workforce continuity established by this Court in the §301 case of *Howard Johnson*, 417 U.S. at 263-64 (which required only "a substantial continuity in the identity of the work force across the change in ownership", with the relevant criterion being "whether the successor employer hires a majority of the predecessor's employees"), and adopted the standard derived from the unfair labor practice case of *Burns*, 406 U.S. at 278-79, in concluding that "*substantial continuity requires that the predecessor's employees constitute a majority of the successor's workforce.*" (Emphasis added) *Smegal II*, 819 F.2d at 194; Pet.App. A6 *infra*. It added that even if petitioners' *Howard Johnson* standard was accepted, "the remaining factors used to evaluate substantial continuity support the district court's decision." *Id.*; Pet.App. A7. A concurring opinion disagreed with the majority's disregard of *Howard Johnson* and their use of the *Burns* standard, noting the conflict with other Circuits, but felt the Union had not violated its duty of fair representation (inexplicably ignoring the earlier decision in *Smegal I*, 763 F.2d 354, 360 (1985)). *Id.*, 819 F.2d at 194-95; Pet.App. A8-A9 *infra*.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving rights of both employees and employers in the area of successorship where there presently exists confusion and uncertainty. It involves the effect of a business transfer on

the *contractual* rights of the acquired employees: specifically, whether a new employer, engaged in the same unionized business, purchasing assets and hiring 89% of a predecessor's workforce (who do not comprise a majority of the enlarged bargaining unit), is a successor who may be compelled to arbitrate the extent of its obligation to honor the unexpired terms of the predecessor's collective bargaining agreement—terms which are virtually identical with the new employer's own union contract. We respectfully urge the Court to grant certiorari and review the circumstances of this case, so that it can provide necessary guidance to lower courts and resolve questions which are of utmost significance to large numbers of workers and prospective employers.

1. The successorship principles previously enunciated by this Court have not clearly decided the meaning of "workforce continuity" in §301 actions.

In *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), this Court first expressed the policy underlying the successorship doctrine. *Id.* at 549. There, under factual circumstances analogous to this case, where the Court found a "substantial continuity of identity in the business enterprise before and after a change", *id.* 551, it held a successor may be required in a §301 action to arbitrate with the incumbent union under the prior collective bargaining agreement. *Id.* at 548. The Court made a distinction between contractual and statutory rights (*id.* at 551 n. 5):

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are

> covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *** There is no problem of conflict with another union *** ."

The Court expressly indicated an arbitrator could find that other terms of the collective bargaining agreement survived the merger. *Id.* at 555.[4]

The first case in which this Court addressed the duty of a successor employer to *bargain* with an incumbent union was *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). There, where the new employer in a competitive bidding context had replaced its competitor four months after a union was certified to represent the predecessor's employees, and had hired 27 former employees while adding 15 of its own, this Court affirmed the Second Circuit's (a) enforcement of the Labor Board's order directing Burns to bargain, and (b) refusal to enforce the Board's order compelling Burns to honor the predecessor's agreement. The bargaining obligation existed because the unit remained appropriate and the majority of the successor's employees had been employed by the predecessor. *Id.* at 281 cf. 278. Section 8(d) of the Act, 29 U.S.C. §158(d), prohibited *the Board* from requiring the successor to honor the terms of the predecessor's contract with the union. *Id.* at 286.

In *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), this Court affirmed a Board order holding a successor employer liable for unfair labor practices committed by the predecessor. The Court noted the successor had knowledge of the predecessor's conduct, reviewed *Wiley* and

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[4]In the ensuing arbitration, Wiley was required to honor seniority rights, job security provisions, and accrued vacation benefits following merger to the time the contract ceased to be viable four months later. *Interscience Encyclopedia, Inc.*, 55 Lab.Arb. 210, 225-26 (1970).

Burns, and concluded the Board's order struck an equitable balance, *id.* at 184-185, observing (*id.* 184 n. 6):

> " *** For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees [citing *Burns*, 406 U.S. at 280 n. 5], the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor nor by any order tied to the continuance of the bargaining agent in the unit involved. *** "

In *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974), where the purchaser of assets commenced operations with 45 employees, only 9 of whom had been formerly employed by the unionized predecessor, this Court clarified the *Wiley* "substantial continuity of identity in the business enterprise" arbitration standard by holding that such test includes a "substantial continuity in the identity of the work force across the change in ownership." *Id.* at 263. Confronted with the union's §301 suit seeking to have the rights of predecessor employees not hired by Howard Johnson submitted to arbitration, this Court explained its workforce continuity holding (*id.* at 263-64):

> " *** The *Wiley* Court seemingly recognized this, as it found the requisite continuity present there in reliance on the 'wholesale transfer' of Interscience employees to Wiley. *** This view is reflected in the emphasis most of the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the successor in §301 suits under *Wiley*. This interpretation of *Wiley* is consistent also with the Court's concern with affording protection to those employees who are in fact

retained in 'the transition from one corporate organization to another' from sudden changes in the terms and conditions of their employment, and with its belief that industrial strife would be avoided if these employees' claims were resolved by arbitration rather than by 'the relative strength...of the contending forces.' *** At the same time, it recognizes that the employees of the terminating employer have no legal right to continued employment with the new employer *** . This holding is compelled, in our view, if the protection afforded employee interests in a change of ownership by *Wiley* is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force." (citations and footnote omitted)

Significantly, this Court in *Howard Johnson* established a mode of analysis for future successorship cases (*id.* 262 n. 9):

" *** [T]he real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. *The answer to this inquiry requires analysis of* [1] *the interests of the new employer and* [2] *the employees and* [3] *of the policies of the labor laws* [4] *in light of the facts of each case and* [5] *the particular legal obligation which is at issue*, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." (emphasis added, citations omitted)

This June the Court decided another refusal-to-bargain successorship case in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S.___, 96 L.Ed.2d 22, 107 S.Ct.___(1987), holding, inter alia, that a successor's obligation to bargain is not limited to the *Burns* situation involving recent certification of a union, and where there was "substantial continuity" between the two enterprises, and "a majority of the successor's employees had been employed by its predecessor" at a time when a substantial and representative complement of employees had been hired, the successor committed an unfair labor practice by refusing to bargain with the predecessor union.

Fall River is particularly significant here for two reasons: first, because the Court expressly acknowledged the confusion caused by its conflicting standards respecting workforce continuity, 482 U.S. at ___n. 12, 96 L.Ed.2d at 40 n. 12; and second, because the issue still remains undecided. *Id.* The Court observed that the Labor Board, with the approval of the Courts of Appeals, has adopted the *Burns* standard (whether a majority of the successor's employees were those of the predecessor) in its successorship cases. *Id.* This is scarcely surprising: in the statutory context of the unfair labor practice of refusal-to-bargain, a union's majority status among the employees of the new employer, or putative successor, is dispositive. The basic question presented by those cases is simply whether the union represents a majority of the successor's employees. Entirely different considerations apply to §301 breach of contract actions involving the duty to arbitrate. *Burns, supra*, 406 U.S. at 286; *Boeing Co. v. International Association of Machinists*, 504 F.2d 307, 319, 321-22 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); *Note, Appropriate Standards of Successor Employer Obligations under Wiley, Howard*

Johnson, and Burns, 25 Wayne L. Rev. 1279 (1979), cited with approval in *Fall River*, *supra*, n. 12. Acceptance of the *Burns* yardstick "is still doubtful in Section 301 suits to compel arbitration under a predecessor's agreement." 1 Morris, *The Developing Labor Law* 716 (2d ed. 1983).

2. The Eighth Circuit's "workforce continuity" rule, as applied to §301 successorship actions, (a) conflicts with decisions of this Court and other Circuits, and (b) fails to conform with the analysis required in determining the legal obligations of the new employer.

(a)

Whatever confusion may have existed from this Court's earlier delineation of workforce continuity standards, there cannot be any question that the Eighth Circuit's application of its rule ("substantial continuity requires that the predecessor's employees constitute a majority of the successor's workforce") to a §301 action is totally without support from *Howard Johnson* or any other prior successorship decision of this Court. *Howard Johnson* required only "a *substantial* continuity in the identity of the work force" (417 U.S. at 263, emphasis added), and cited lower court decisions emphasizing "whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the successor in §301 suits under *Wiley*." *Id.* at 263-64, and n. 10. The concurring opinion in this case stated "No other court of appeals has rejected this criterion" and cited decisions from the Fifth and First Circuits in accord. *Smegal II*, 819 F.2d at 194-95; Pet.App. A8 *infra*.

(b)

Equally intolerable, however, is the failure of the Eighth Circuit (and the District Court) to perform the required analysis of the five factors enumerated in *Howard Johnson* which we have quoted on page 12 *supra*. Thus:

[1] Nowhere in the opinion is there any recognition that the new employer, Gateway, had a same-length contract with the Union for Gateway/Minneapolis employees having virtually identical economic provisions with those in the Union's contract with National/Hopkins ("the pay scale and the benefits were the same", Aldrich Dep. 36). The Gateway takeover of National's Hopkins warehouse and distribution operation was *not* that of a "moribund business" which would "saddle" Gateway with "terms and conditions of employment contained in an old collective-bargaining contract" which would "discourage and inhibit the transfer of capital." *Burns*, 406 U.S. at 287-88. The takeover simply represented a doubling of Gateway's warehouse and distribution activity on known and currently accepted terms.

[2] Nowhere in the opinion is there any acknowledgment of the emphasis in *Wiley* of the need to afford some protection to employees during a change in employer ownership.

> " *** The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." 376 U.S. at 549.

Here, at the time of the Gateway takeover, the National-Union labor agreement had one year to run before it expired. Under it, employees' seniority was broken only by

discharge, voluntary quit, or more than a one year layoff. National never incurred the costs attendant upon discharge or termination of petitioners (such as unemployment compensation, severance pay, or "withdrawal liability" under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1381-1461), and the employees were merely transferred to and hired by Gateway as new employees, at reduced wages and benefits. What occurred here was that Gateway acquired without a hitch in production a going concern *purged* of employees' earned contractual benefits, and National received the enhanced value of an ongoing enterprise attributable to the continued production of the employees.

[3] Nowhere in the opinion is there any analysis of "the policies of the labor laws", particularly the Congressional response to this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), as represented by the addition of §1113 of the Bankruptcy Code, 11 U.S.C. §1113 (Supp. II 1984). See *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986), holding a debtor-employer will be bound by its collective bargaining agreement, unless it can show (1) that rejection of the agreement is essential to permit the successful reorganization of the business, and (2) that all affected parties (union, employees, other creditors) are treated fairly and equitably. Here, under the instant decision, we have the anomalous result of contractual rights and benefits being extinguished by the voluntary sale of a profitable enterprise more easily than they could be repudiated in a bankruptcy reorganization. Such a result does not comport with national labor policy.

[4] Nowhere in the opinion is there an intensive and accurate examination of the facts which this Court has

declared to be "especially appropriate" if not dispositive in successorship cases. *Howard Johnson*, 417 U.S. at 256. Reading the Eighth Circuit's decision (and the District Court's as well) *one would never learn* that Gateway's takeover of National's Hopkins warehouse operation involved a purchase of over $5 million of assets; that the deal included an option (later exercised) for Gateway to also acquire National's retail stores; that Gateway hired petitioners when it had no legal obligation under *Burns* to do so, and this conduct evinced a deliberate intent to acquire the benefits of an experienced work force *without* their earned contractual benefits; that Gateway (akin to the successor in *Golden State Bottling*, *supra*) was chargeable with knowledge of the successors-and-assigns clause in the National-Union contract, and could reasonably have expected to be charged with successorship status in a §301 proceeding (hence the indemnity provision in the Gateway-National service agreement); that the Union's officials did not consider the warehouse takeover to be a "subcontract"; that the same Union represented *both* employee complements at Gateway and National; that Gateway hired 89% of National's employees; that National's Hopkins warehouse operation was not that of a moribund business; and that Gateway operated this warehouse for *fourteen* months following the takeover, from July 1981 until October 1982 (well beyond the May/June 1982 expiration date of the National-Union contract).

[5] Lastly, the opinion ignores "the particular legal obligation which is at issue" by applying an unfair labor practice yardstick of majority status to a §301 suit to compel arbitration under a predecessor's labor agreement. This is contrary to the explicit decisional law cited in the concurring opinion, and to *Wiley's* distinction between contractual

and statutory rights (376 U.S. at 551 n. 5) which we have quoted on pages 9-10 *supra*.

Under appropriate circumstances, successorship arbitration does impose terms and conditions from a predecessor's contract upon the successor. See, e.g., *Interscience Encyclopedia, Inc.*, 55 Lab.Arb. 210, 225-26 (1970); *Steelworkers v. United States Gypsum Co.*, 492 F.2d 713 (5th Cir.), *reh. denied*, 498 F.2d 334, *cert. denied*, 419 U.S. 998, *reh. denied*, 419 U.S. 1097 (1974); *Schneier's Finer Foods, Inc.*, 72 Lab.Arb. 881, 886, 889-890 (1979); *Graphic Arts Int'l Union, Local 1B v. Martin Podany Associates*, 531 F.Supp. 169 (D. Minn. 1982), *cf. Martin Podany Associates*, 80 Lab.Arb. 658 (1983); *Local 1115 v. B & K Investments, Inc.*, 436 F.Supp. 1203 (S.D. Fla. 1977), *B & K Investments, Inc.*, 71 Lab.Arb. 366, 374-375 (1978), *enforced, Local 1115 v. B & K Investments, Inc.*, unreported, 100 LRRM 2174 (S.D.N.Y. 1978), the court observing (at 2176):

> "...But neither the Supreme Court, nor, so far as I have found, any other court, has said that Burns or Howard Johnson prevents a Wiley arbitrator from subjecting the successor to the obligations of his predecessor's contract *from the date of the takeover to the expiration of the contract.*" (emphasis added)

See also *Local 1115, Joint Board (B & K Investments)*, 248 NLRB 1234, 1243, 104 LRRM 1120, 1122 (1980), where the Board stated:

> "...Merely because the Board may not order B & K in a Section 8(a)(5) complaint proceeding to comply with its predecessors' agreements *does not limit the power of the District Court to find that the arbitration clause of the predecessor's agreement is binding upon the successor,*

> *to order a Wiley arbitration, and to confirm a Wiley arbitration award."* (emphasis added)

Cf. Teamsters, Local 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974). These were the procedures envisioned by petitioner Smegal when he filed his successorship grievance.

The question presented in this case is the same regardless of the identity of the party seeking enforcement of the claim. The Union could be that party. Here, petitioners seek enforcement because their union did not. Petitioners' entitlement to make this claim has previously been decided in their favor. *Smegal I*, 763 F.2d 354, 360 (8th Cir. 1985).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

September 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 86-5414MN

Richard L. Smegal, et al.,
Appellants,
v.
Gateway Foods of Minneapolis, Inc. and Over-the-Road, et al.,
Appellees,
and
Gateway Foods of Minneapolis, Inc. and Over-the-Road, etc., Local 544,
v.
National Super Markets, Inc.

Appeal from the United States District Court for the District of Minnesota.

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

May 21, 1987

A true copy:

ATTEST: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5414

Richard L. Smegal, Marvin A. Rogers and Rodney W. Bomstad, on behalf of themselves and all others similarly situated,

Appellants,

v.

Gateway Foods of Minneapolis, Inc. and Over-the-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local No. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, National Super Markets, Inc.,

Appellees,

and

Gateway Foods of Minneapolis, Inc. and Over-the-Road, etc. Local 544,

v.

National Super Markets, Inc.

Appeal from the United States District Court for the District of Minnesota.

Submitted: May 11, 1987
Filed: May 21, 1987

Before ARNOLD, Circuit Judge, WRIGHT,* Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

WRIGHT, Senior Circuit Judge.

The sole issue in this appeal is whether Gateway Foods of Minneapolis, Inc. is a successor employer, obligated to adhere to the terms of the collective bargaining agreement between National Super Markets, Inc. and Over-the-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local No. 544. We hold that it is not a successor employer and do not reach the issue of its obligation to adhere to the contract.

BACKGROUND

Appellants were drivers and warehousemen for National Super Markets, Inc. who worked at its Hopkins, Minnesota warehouse. These workers were represented by Local 544, affiliated with the International Brotherhood of Teamsters, and were covered by a contract that would expire in June 1982. The contract included a successors and assigns clause, requiring a successor to abide by the National contract. A national Teamster contract, which covered the employees also, included a clause that allowed for abrogation of the contract if the work was subcontracted.

In June 1981, National executed an agreement with Gateway Foods of Minneapolis, Inc., which purported to subcontract the warehouse/distribution aspect of the National business to Gateway. As part of the agreement

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*The Honorable Eugene A. Wright, United States Senior Circuit Judge for the Ninth Circuit, sitting by designation.

National subleased the Hopkins warehouse and equipment to Gateway. Gateway agreed to hire the National employees, if they approved a contract bringing them in as new hires behind all Gateway employees, and at reduced wages and benefits. The Teamsters agreed to the proposal.

Immediately after the phase in of the new operation, in August of 1982, 113 of 127 former National employees were working for Gateway, but 37 drivers were no longer based at the Hopkins facility, and a number of junior warehouse workers had been transferred to the Minneapolis warehouse. By June of 1982 only 42 former Hopkins-based employees remained there. At all times the National employees were a minority of the Gateway staff.

The general nature of work and occupations of the National employees remained the same. However, Gateway reorganized its operation somewhat, consolidating certain operations in the Hopkins warehouse and certain functions in Minneapolis. The service provided by Gateway, into which the Hopkins warehouse was integrated, was that of a large-scale food wholesaler. Therefore, it differed from the retail grocery business, with a subsidiary storage and distribution operation, conducted by National.

Several former National employees filed a grievance against Gateway, alleging that, as a successor employer, Gateway was required to accord them their full contractual seniority rights, wages, and benefits. When Gateway refused to consider the grievance, and the Teamsters declined to pursue the matter, both were sued in federal court: Gateway for breach of contract under §301 of the Labor Management Relations Act, and the union for breach of the duty of fair representation.

The district court granted defendants' motion for summary judgment, but we reversed, concluding that we could

not say as a matter of law that Gateway was not a successor employer. On remand the court held that it was not a successor, and this appeal followed.

ANALYSIS

The appellants, collectively Smegal, argue that Gateway is a successor because a majority of former National employees were hired by Gateway and continued to do the same work, under the same supervisors, in the same location, for the same parties. The district court found that Gateway was not a successor because there was no substantial continuity between the National and Gateway operations. It found that the National employees were a minority of the new group, that their work and working conditions had changed, their supervisors were different, and the services offered had changed. These findings are not clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

The district court analyzed in depth the controlling authorities regarding the question of successorship. As it correctly noted, the court must make a case by case analysis of the question, taking into account the facts and the context of each case. *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees & Bartenders Int'l Union*, 417 U.S. 249, 256 (1974). It must balance the rights of employers and facilitate the transfer of capital, while protecting the employees. *Id.* at 253-55, *N.L.R.B. v. Winco Petroleum Co.*, 668 F.2d 973, 977-78 (8th Cir. 1982).

The major test for a successor employer is whether there is substantial continuity between the new operation and the old, particularly with regard to the employees. *See Valmac Industries, Inc. v. N.L.R.B.*, 599 F.2d 246, 248 (8th Cir.

1979); *Russom v. Sears, Roebuck & Co.*, 415 F. Supp. 792, 797 (E.D. Mo. 1976), *aff'd*, 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977). There has been some confusion, however, about the definition of "substantial continuity."

In an unfair labor practice suit the Supreme Court held that continuity meant that a majority of the new employer's work force came from the predecessor. *N.L.R.B. v. Burns Int'l Security Serv.*, 406 U.S. 272, 278-79 (1972). In a case brought under §301 of the Labor Management Relations Act the Court described substantial continuity as the successor employer hiring the majority of the predecessor's employees. *Howard Johnson*, 417 U.S. at 263. However, as the district court noted, the *Burns* test has become the standard used, *i.e.*, substantial continuity requires that the predecessor's employees constitute a majority of the successor's workforce. *See* C. Morris, *The Developing Labor Law* 715 (B.N.A. 2d ed., 1983); *id.* at 185 (Supp. 1985).

We have ruled that in a case involving a claim of failure to bargain, a majority of the successor's employees must have been employed by the preceding employer. *See Valmac Industries*, 599 F.2d at 248. We have not ruled directly on which test is to be used when a §301 charge is involved.

In one case the circuit did determine that an employer was a successor when a majority of the predecessor's employees had been hired. *See Winco*, 668 F.2d at 978. In that case, however, the Labor Board had ruled that the segment of employees hired from the previous employer continued to constitute an appropriate, separate, unchanged bargaining unit. It then found that their work, working conditions, supervisors, and services performed remained unchanged. *Id.* at 976. The case does not support the alternative definition of "majority of employees" proposed by Smegal.

Even if the appellants' definition of the majority test were accepted by the panel, the remaining factors used to evaluate substantial continuity support the district court's decision. The seven factors include: 1) substantial continuity of the same business operations, 2) use of the same plant, 3) continuity of the work force, 4) similarity of jobs and working conditions, 5) similarity of supervisory personnel, 6) similarity in machinery, equipment, and production methods, and 7) similarity of products or services. *Russom*, 415 F. Supp. at 797; C. Morris, *The Developing Labor Law* 726 (B.N.A. 2d ed., 1983).

As a major food wholesaler, serving approximately 500 outlets from several warehouses, the Gateway operation bore only a superficial resemblance to National's small distribution center. Because Gateway consolidated the warehouses, much of the work previously done in the National plant was transferred. Similarly, while the occupations of National employees remained the same, the transition to large scale wholesaling, and the new organizational structure of Gateway necessarily changed the nature of their jobs and working conditions. The mix of the employees included changes of supervisory personnel as well. On the whole, the weight of these factors suggests that Gateway is not a successor employer.

CONCLUSION

We hold that Gateway is not a successor employer and affirm the district court decision. The evidence demonstrated that there is not substantial continuity between the Gateway and National operations.

ARNOLD, Circuit Judge, concurring.

I am not fully persuaded that the Court has applied the proper standards in determining the issue of successorship. Here, 113 of the 127 employees of the former employer were hired by the new employer. I am inclined to think that this fact points significantly towards a finding of successorship. The question presented here arises not in the context of a refusal to bargain, where majority status among the employees of the present employer is dispositive, but rather in the context of a §301 action for enforcement of a collective-bargaining agreement. In such a situation, the Supreme Court has implied, if it has not held, that the relevant criterion is whether the "acquired" employees amount to a majority of the employees of the former employer. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 263-64 (1974). No other court of appeals has rejected this criterion. Instead, the Fifth Circuit has held that it, rather than the standard the Court adopts here, whether the "acquired" employees constitute a majority of the successor's workforce, is the chief consideration in the §301 context. *Boeing Co. v. International Association of Machinists & Aerospace Workers*, 504 F.2d. 307, 318-21 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1976). See also *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 n.6 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976).

I think it unnecessary to create this conflict with the law of another circuit. Here, the ultimate issue is whether the Union violated its duty of fair representation. Only if such a violation is found can an action be entertained for breach of contract against the employers, past and present. Whatever the merits of the question of successorship, I am persuaded that it is, as a matter of law, close enough to

justify the Union's decision not to pursue a grievance based on a successorship theory. Therefore, I agree that the complaint was properly dismissed, and I concur in the result reached by this Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5414-MN

Richard L. Smegal, et al.,
Appellants,

v.

Gateway Foods of Minneapolis, Inc., et al.,
Appellees.

Appeal from the United States District Court for the District of Minnesota

Appellants' petition for rehearing has been considered by the Court and is hereby denied.

June 19, 1987

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 86-5414 MN

Richard L. Smegal, et al, etc.,
Appellants,

v.

Gateway Foods of Minneapolis, Inc., et al.,
Appellees,

and

Gateway Foods of Minneapolis, Inc. and Over-the-Road, etc. Local 544,

v.

National Super Markets, Inc.

Appeal from the United States District Court for the District of Minnesota

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ORDER

On the Court's own motion the opinion filed May 21, 1987 is amended in the following respects:

On page 3, line 3, change the first three words to read "August of 1981."

On page 6, correct the first complete sentence to read:

> As a major food wholesaler, serving approximately 500 outlets from several warehouses, the new Gateway operation bore only a superficial resemblance to National's smaller, single center distribution center.

June 19, 1987

Order entered at the direction
of the Court.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard L. Smegal, Marvin A. Rogers, and Rodney W. Bomstad, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Gateway Foods of Minneapolis, Inc., National Super Markets, Inc. and Over-The-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local No. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

Defendants,

and

Gateway Foods of Minneapolis, Inc.,

Third-Party Plaintiff,

v.

National Super Markets, Inc.,

Third-Party Defendant.

Civil File No. 3-81-1105

MEMORANDUM AND ORDER

This matter comes before the court on remand from the United States Court of Appeals for the Eighth Circuit. The issue on remand is whether Gateway Foods of Minneapolis,

Inc. (Gateway) is a successor to the operation of the food distribution warehouse by National Supermarkets, Inc. (National) and becomes obligated to adhere to the terms and provisions of a collective bargaining agreement between National and the International Brotherhood of Teamsters Local 544 (Union). This matter also comes before the court on the motion of National to dismiss or, in the alternative, to strike Gateway's third party complaint against National.

The court adopts by reference the stipulated facts of the parties. The salient facts are:

Both National and Gateway operate wholesale food distribution warehouses. The plaintiffs were drivers and warehousemen for National who were employed under a collective bargaining agreement that expired in June 1982. In June 1981, National and Gateway signed a "service agreement," under which Gateway agreed, among other things, to sublease National's warehouse in Hopkins, Minnesota.

The parties made the transaction contingent upon an agreement between Gateway and the Union that would make the former National employees new hires of Gateway. Gateway and the Union subsequently entered into this agreement. Asserting that Gateway was a successor to National and was bound to the terms of the National-Union collective bargaining agreement, the plaintiffs filed a grievance against Gateway. In the grievance, the plaintiffs sought arbitration of their seniority, wages, and other benefits. Gateway rejected the grievance, however, and the Union did not seek to compel Gateway to arbitrate. The Union-Gateway agreement "endtailed" the plaintiffs to the end of the seniority list, thus permitting Gateway employ-

ees to displace the plaintiffs from their jobs at the Hopkins warehouse.

The plaintiffs commenced an action for damages and equitable relief, alleging that National and Gateway breached their respective bargaining agreements and that the Union breached its duty of fair representation. In an order dated July 28, 1983, the court granted summary judgment for the defendants. The Eighth Circuit remanded for consideration of the successorship issue. The plaintiffs ask the court to find that Gateway is a successor employer to National and that therefore, by refusing to honor the National-Union collective bargaining agreement, Gateway is liable in damages for displacing the plaintiffs in violation of their accrued seniority with National. The defendants contend that Gateway is not a successor employer to National and consequently has no obligation to honor the National-Union contract.

The successorhip issue deals with the extent to which an employer is obligated to honor the legal relationships that another employer and a union have established. Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 Minn. L. Rev. 1051, 1052-53 (1973). Underlying this doctrine are the policy considerations of facilitating the transfer of capital while at the same time protecting employees against disruptive transitions. *Id.* The United States Supreme Court, however, has not developed a "single definition" for resolution of this issue and has left the courts to determine successorship as the cases arise. *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union*, 417 U.S. 249, 256 (1974).

In the first of a trilogy of cases on this issue, the Supreme Court considered the obligations of a successor company

that had acquired its predecessor through corporate merger. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546 (1964). A union brought an action under section 301 of the Labor Management Relations Act[1] to compel arbitration under the collective bargaining agreement between the union and the company that had disappeared in the merger. Basing its decision in large part on the strong national policy favoring arbitration, the Court held that, in some circumstances, a court may enforce the terms of a predecessor's collective bargaining agreement against a successor employer. *Id.* at 548-51.

Eight years later, the Supreme Court addressed the question of successorship in the context of a refusal-to-bargain case. *NLRB v. Burns International Security Servs.*, 406 U.S. 272, 277 (1972). Burns Security Services (Burns) won a contract to provide security services at a Lockheed plant when Wackenhut's contract with the plant operator expired. Burns retained 27 of Wackenhut's 42 guards and brought in 15 of its own. The Court held, first, that Burns was obligated to bargain with the predecessor's union. Noting that Burns had retained a majority of the old Wackenhut employees, the Court relied on fundamental principles of labor law that an employer must recognize the employee's majority representative in a unit appropriate for bargaining. *Id.* at 278-79. The Court held, second, that the successor was not bound by the substantive terms of the collective bargaining agreement between Wackenhut and

[1] 29 U.S.C. §185(a). Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

the union. This holding was predicated on federal policy barring government intrusion in labor agreement terms. The Court also stated that ordering Burns to assume the obligations of Wackenhut's agreement would unduly inhibit the free transfer of capital. *Id.* at 282-84.

In the third of the trilogy cases, a successor company refused to arbitrate its refusal to hire the predecessor's employees and the union brought an action under section 301. *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees & Bartenders International Union*, 417 U.S. 249, 252-53 (1974). Unlike *Wiley*, however, the Court refused to order arbitration. The Court stressed the narrow holding in *Wiley* and stated that:

> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in suits under §301 and, thus, to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims. Clearly the reasoning of *Burns* must be taken into account here.

Id. at 256.

From a reading of the foregoing Supreme Court decisions, it becomes evident that the central focus in successorship cases is whether there is a substantial continuity of identity in the business enterprise across the change in ownership. The courts, National Labor Relations Board and commentators have outlined a number of factors to serve as guideposts for analysis. These factors include consideration of: (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of the work force, (4) similarity of jobs and working conditions, (5) similarity of

supervisory personnel, (6) similarity in machinery, equipment, and production methods, and (7) similarity of products or services. *Russom v. Sears, Roebuck & Co.*, 415 F. Supp. 792, 797 (E.D. Mo. 1976), *aff'd* 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977).

Of these, the key factor in determining whether an employer succeeds to successorship obligations is the substantial continuity of the work force. *Audit Servs., Inc. v. Roflson*, 641 F.2d 757, 763 (6th Cir. 1981). The plaintiffs attempt to bring themselves within this factor by relying on *Wiley* and by urging the court to recognize the existence of two different successorship tests. The plaintiffs contend that the court's test in *Howard Johnson* for determining successorship is whether the successor hired a majority of the predecessor's employees, while the test in *Burns* is whether the predecessor's employees constitute a majority of the successor's work force. The plaintiffs argue that because they brought their action under section 301, the court should measure the majority formulation under the test in *Howard Johnson*.

These arguments, however, overlook significant commentary on the successorship issue. As one commentator notes, the decision in *Howard Johnson* calls into question the continuing significance of the holding in *Wiley*. R. Gorman, *Labor Law* 580 (1976). Noting that the Court in *Howard Johnson* emphasized the narrow holding in *Wiley* and recognized the importance of free transfer of capital, Professor Gorman writes that "[i]t is clear that the Court [in Howard Johnson] has cut back on its broad pronouncements in Wiley...." *Id.* at 583.

Another commentator has questioned whether, as the plaintiffs argue, the Court in *Howard Johnson* actually intended two different tests to determine the continuity of

the work force. C. Morris, *The Developing Labor Law* 713 n. 77 (1983). Indeed, the Court in *Howard Johnson* argued that the policy considerations in *Burns* were as relevant in a section 301 action to compel arbitration as they were in a refusal to bargain case. *Howard Johnson*, 417 U.S. at 256. Even assuming arguendo the existence of two different yardsticks, the test in *Burns* has become the guiding principle for measuring majority status. C. Morris, *The Developing Labor Law* 185 (Supp. 1984). In contrast, the test that the plaintiffs propose has met mixed reviews in the circuit courts. *See id.* at 187 (noting that court decisions have failed to clarify application of formulation in *Howard Johnson* to cases arising under section 301). Moreover, the courts in some section 301 decisions have relied on the majority considerations in *Burns* as the relevant barometer in assessing successorship. *See Service Employees Local 47 v. Cleveland Tower Hotel, Inc.*, 606 F.2d 684, 687 (6th Cir. 1979) (noting that predecessor's employees did not constitute majority of new staff).

Here, Gateway hired 113 former National employees out of a possible group of 127. These employees, however, did not constitute a majority of workers in the combined Gateway-National work force. Thus, in applying the test in *Burns*, the court concludes that the plaintiffs have failed to establish a substantial continuity in the work force.

In their memorandum, the plaintiffs rely on several cases for the proposition that the court should follow the rule in *Howard Johnson* in determining the perimeters of successorship. The plaintiffs' reliance on the value of these decisions to the facts of the instant case, however, is misplaced. Essentially, the successorship cases from the courts and the National Labor Relations Board fall into four categories. The first category consists of cases determining

successorship because the successor hired all or nearly all of the predecessor's employees and these employees constituted a majority of the successor's work force. *See Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 893 (3rd Cir. 1974); *GAUI v. Martin Podany*, 531 F. Supp. 169, 172, (D. Minn. 1982); *Local 115 Joint Board Nursing Home and Hospital Employees v. B & K Investments*, 436 F. Supp. 1203, 1209 (S.D. Fla. 1977). Unlike the instant case, however, these cases never reached the issue of successorship in the face of a situation in which the predecessor's employees did not represent a majority of the combined work force. In the second category, the successor hired only a small proportion of the predecessor's employees and these employees constituted only a small percentage of the combined work force. This category is inapplicable to the facts of the instant case. In the third category are cases that have found successorship where the successor has taken only a small number of the predecessor's employees and those employees formed the bulk of the successor's work force. *See NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3 (1st Cir. 1976). Applying this category here is problematic because of the factual differences in the instant case. The fourth category consists of cases in which the courts have refused to bind the purchasing company to successorship obligations because the predecessor's employees did not represent a majority of the combined work force. *See Boeing v. International Ass'n of Machinists and Aerospace Workers*, 504 F.2d 307, 323 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1976). The instant case represents just such a case.

Having determined there is no substantial continuity of the work force here, the court next examines the remaining factors for determining successorship. The plaintiffs argue that these criterion demonstrate that Gateway was a suc-

cessor to National's food operation at the Hopkins warehouse. With one exception, the plaintiffs' arguments are without merit.

Prior to the transaction, National's warehouse and distribution facilities served only National's 64 stores. Unlike National, Gateway distributed groceries from its warehouses to independent retail food outlets. Thus, the court concludes that no substantial continuity exists between the two business operations. Furthermore, although Gateway subleased the Hopkins warehouse from National, it also distributed groceries from its two other warehouses in Minneapolis and assigned many former National employees to work out of the Minneapolis facilities. In the view of the court, Gateway did not use the same plant as National for a substantial proportion of the former National employees. Although the job classifications of the former National employees remained unchanged, Gateway consolidated the handling of fresh meat and produce at the Hopkins warehouse and the distribution of other grocery items at the Minneapolis facilities. The court is convinced that no substantial similarity of working conditions exists. In addition, as a result of the assignment to Minneapolis, these employees came under the supervision of Gateway personnel. Thus, there was no significant carryover of managerial and supervisory authority. Finally, as discussed above, Gateway offered substantially different services than National.

With respect to the similarity of the machinery, equipment, and production methods the former National employees used before and after the transaction, the plaintiffs correctly conclude that there was no substantial variation in the equipment and production methods. This similarity, however, is not of such magnitude to be controlling.

Thus, applying the foregoing factors to the instant case, the court finds that Gateway is not a successor employer to National.[2] Accordingly, IT IS ORDERED that:

Judgment will be entered for the defendants.

Dated: September 24, 1986.

/s/ Paul A. Magnuson

Paul A. Magnuson
United States District Judge

[2]Having determined that Gateway is not a successor to National, the court will not reach National's motion to dismiss or alternatively to strike Gateway's third party complaint.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

RICHARD L. SMEGAL, MARVIN A. ROGERS, and RODNEY W. BOMSTAD, on behalf of themselves and all others similarly situated, Plaintiffs, vs. GATEWAY FOODS OF MINNEAPOLIS, INC., NATIONAL SUPER MARKETS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Defendants.	3-81 Civil No. 1105 STIPULATION OF FACTS ON SUCCESSORSHIP ISSUE

The parties hereto, by their undersigned attorneys, hereby stipulate and agree, for purposes of this proceeding only, and without waiving any proper objection on grounds of relevancy or materiality, that the following facts, with respect to the issue of successorship, are true:

1. The documents marked as listed and attached hereto are true, correct and authentic copies of documents they purport to be and the foundation for their admission into evidence is established:

Exhibit A - Service Agreement between Gateway and National, dated June 23, 1981.

Exhibit B - Agreement to Sublease Warehouse and Purchase and/or Lease Equipment and Inventory, dated June 23, 1981.

Exhibit C - Sublease of National's Hopkins Warehouse by Gateway, dated June 23, 1981, supplemented by letter from National to Gateway dated August 19, 1981, setting Sublease term as August 24, 1981-July 22, 1991.

Exhibit D - Contingency Agreement between Gateway and National dated June 23, 1981.

Exhibit E - Working [Labor] Agreement between May Brothers Company and IBT Local 544, June 3, 1979-May 29, 1982 (name of employer changed to Gateway Foods of Minneapolis, Inc. on February 11, 1981 as result of stock purchase).

Exhibit F - National & Multi-Local IBT Master Agreement (including IBT Local 544), June 10, 1979-June 12, 1982.

Exhibit G - National & IBT Local 544 Local Addendum, June 3, 1979-May 29, 1982.

Exhibit H - Transition Agreement between Gateway & IBT Local 544, effective July 6, 1981.

Exhibit I - Agreement between Gateway & IBT Local 544, dated July 22, 1981 (continuing §3.9 of National/Local 544 Local Addendum respecting bakery employees).

Exhibit J - Agreement between Gateway & IBT Local 544, dated August 14, 1981 (Union) and November 12, 1981 (Gateway).

Exhibit K - Smegal Grievance No. 2707 dated August 23, 1981.

Exhibit L - Gateway reply to Grievance No. 2707, dated September 10, 1981.

Exhibit M - Smegal Unfair Labor Practice Charges against Gateway (NLRB Case No. 18-CA-7492) and IBT Local 544 (NLRB Case No. 18-CB-1192), both dated November 9, 1981.

Exhibit N - NLRB Regional Director's decision refusing to issue complaint in Case Nos. 18-CA-7492 and 18-CB-1192, dated December 30, 1981.

Exhibit O - NLRB General Counsel's denial of appeal in Case Nos. 18-CA-7492 and 18-CB-1192, dated January 29, 1982.

Exhibit P - Gateway sales to National and Applebaum's stores by year.

Exhibit Q - Decision of National Tea Co. and IBT Joint National Arbitration Committee, dated May 13, 1982.

2. (a) Defendant National Super Markets, Inc. (National), a Michigan corporation, is a wholly owned subsidiary of National Tea Co., an Illinois corporation. National Tea Co. is owned by Loblaw Cos., Ltd., Toronto, Ontario, Canada, either directly or indirectly.

(b) At all times material prior to March 1983, when National Tea Co. sold its National/Applebaum stores to Gateway Foods, Inc., National owned and operated 64 retail food outlets in the States of Minnesota and Wisconsin under the trade names of "National Food" (23 stores) and "Applebaum's" (41 stores, all in Minnesota).

(c) Prior to June 23, 1981, National leased and operated a wholesale food distribution warehouse in Hopkins, Minnesota, which serviced its 64 stores above-described.

(d) At its Hopkins warehouse, National employed a total of 137 employees who were covered by National's labor contract with IBT Local 544: 90 warehousemen, 37 drivers, and 10 bakery department slicers, wrappers and shippers.

(e) At its Hopkins warehouse, National also employed approximately 6 mechanics; these employees were covered under a separate labor agreement with the IAMAW.

3. (a) Defendant Gateway Foods of Minneapolis, Inc. (Gateway), a Minnesota corporation, is a wholly owned subsidiary of Gateway Foods, Inc., a Wisconsin corporation. The parent corporation also owns and operates Gateway Foods of Minnesota, Inc., in Duluth, and Gateway Foods of Sioux City, Iowa, both also in the food distribution business.

(b) At all times material prior to March 1983, when National Tea Co. sold its National/Applebaum stores to Gateway Foods, Inc., Gateway did not own or operate any retail food outlets in Minnesota. In March 1983, Gateway acquired from National all of the National/Applebaum retail food outlets (then numbering 52), and thereafter sold 37 of those stores to subsequent purchasers (including some of its own officials), and retained the remaining 15 stores as its own retail food outlets.

(c) At all times material, Gateway owned and operated two wholesale food distribution warehouses in Minneapolis, Minnesota. Gateway's warehouses serviced approximately 500 stores throughout Minnesota and western Wisconsin as of July, 1981, ranging from small family owned outlets to super markets. Included among those Gateway customers was National (for both its National and Applebaum stores) with respect to certain dry groceries and frozen foods—conditions imposed upon National by the Federal Trade Commission after National had acquired the Applebaum stores in 1979. The percentage of Gateway's total volume of business sold and delivered to the above-described retail outlets by year are set forth on Exhibit P annexed.

(d) At its Minneapolis warehouses, as of June 23, 1981, Gateway employed a total of 135 employees who were covered by Gateway's labor contract with IBT Local 544: 88 warehousemen, 40 drivers, no bakery personnel, but 7 mechanics and helpers.

4. The seniority dates of the National and Gateway employees represented by IBT Local 544 with their respective employers as of June 23, 1981 are as follows:

Year	National Warehouse	Gateway Warehouse	Nat'l Driver	Gateway Driver	Nat'l Bakery	Gateway Mechanics
1939	1					
1941	1					
1942		1				
1945	1					
1946	3		1	1		
1947	5		1			
1948	3		1			
1949	4	3	1			
1950	3	1	1		2	
1951	3	4	4	1		
1952	7	4	2	1		
1953	3	5	7	1	1	
1954		3	2			
1955		1				
1956	2			1		
1957		4		5		
1958		1		1		
1959		3				
1960		2	1	3		
1961		7		3		
1962		3		2		
1963	1	1	1	2		
1964				1		
1965		3	1			
1966		1	1	1		
1967	2	1				
1968	2	4		1		1
1969		16		3		2
1970		1				2
1971					1	

Year	National Warehouse	Gateway Warehouse	Nat'l Driver	Gateway Driver	Nat'l Bakery	Gateway Mechanics
1972						
1973	3	3				
1974		1			2	
1975		4		1		
1976	3	6		8	1	2
1977	4			1		
1978	4		1		1	
1979	20		10			
1980	15		2		2	
1981		5*		3**		

* Eight (8) more Gateway warehouse employees were hired after June 23, 1981 and before July 6, 1981.

** Two (2) more Gateway drivers were hired after June 23, 1981 and before July 6, 1981.

At the time of these additions, Gateway had obtained new customers not previously served.

5. On June 23, 1981, as a result of negotiations which had occurred since May 19, 1981 (to which the Union was not privy), National and Gateway entered into four different agreements—namely:

(a) A "Service Agreement" (see attached Exhibit A), having a term or duration of five years, but terminable by either party at any time upon one year's notice (paragraph 2.3 on page 7), whereby Gateway undertook to sell and distribute wholesale merchandise to some 64 National retail stores (operating under the "National" and "Applebaum" names) in Minnesota and Wisconsin.

(b) National subleased most of its Hopkins warehouse facility, along with specified trade fixtures and equipment, to Gateway for a term of five years (see attached Exhibit C). If the Service Agreement was terminated, the warehouse sublease was terminable sixty days thereafter.

The term of the sublease was later amended to run from August 24, 1981-July 22, 1991.

(c) National sold to Gateway its warehouse inventory, fixtures and equipment (see attached Exhibit B). If the Service Agreement was terminated National was obligated to repurchase the trade fixtures and equipment. Gateway paid National a sum approximating $5,100,000 for the above-described inventory, fixtures and equipment; roughly $1,800,000 was paid in cash at the closing held August 24, 1981, the balance by promissory notes.

(d) Finally, National and Gateway agreed that the Service Agreement would be contingent upon Gateway being able to reach a "satisfactory agreement" with the Union within fifteen days from June 23, 1981 (see attached Exhibit D for the terms thereof).

6. National's officials informed the Union's chief executive officer on June 24, 1981, that National was getting out of the warehouse business, that Gateway would be servicing the stores and National was discontinuing its warehousing and transportation operation under the "subcontracting" provisions of the National-Union Master Agreement (Exhibit F attached), that Gateway had agreed to employ whatever extra people it needed as a result of the acquisition of the National business, and that the transaction was to take place as soon as possible "but certainly about the middle of July".

7. Two Union officials, Madden and Huemoeller, met with representatives of Gateway on Monday, June 29, 1981. Gateway told the Union that it was going to lease the Hopkins warehouse and service the National and Applebaum stores, and it expected to hire the majority of the

National employees as new hires. The Union responded by requesting dovetailing of seniority, the granting of full vacation and fringe benefits, and essentially the treating of National employees as ongoing employees. Gateway controverted this position, asserting its only obligation was to hire National employees, as needed, as new employees of Gateway. The meeting ended inconclusively.

8. The same parties met again on Wednesday, July 1, 1981, and resolved their differences. Their agreement is embodied in Exhibit H.

9. The terms of this "Transition Agreement" were reduced to writing and signed by Madden on Friday, July 3, 1981, and mailed to Gateway (copy attached as Exhibit H).

10. Gateway commenced its distribution to and servicing of the National/Applebaum stores at the rate of approximately ten stores per week for a period of approximately six weeks, actually starting on July 9, 1981 and completing the phase-in by August 24, 1981. The closing of the National-Gateway agreements previously described in ¶ 5 occurred on August 24, 1981.

11. During this interim period above-described, the more senior National employees continued working for National at Hopkins, while the junior employees were hired by Gateway, as new employees, at the reduced wages and benefits provided by the Transition Agreement.

12. (a) On July 22, 1981, Gateway and the Union signed an Agreement (see Exhibit I attached) "for the purposes of clarifying the position of the [10 National] Bakery Department employees".

(b) The Agreement recited that Gateway had agreed with National

"to acquire all of National's wholesale food distribution operation...including the Bakery Department which continues to be operated by National in Hopkins with the employees under Local 544's jurisdiction being provided by Gateway."

(c) The Agreement also provided

"that Article 3.9 of the National Supermarkets agreement for Hopkins will be maintained for the benefit of the Bakery employees, providing that should the Bakery Department be discontinued for any reason the employees on the payroll at that time would be dovetailed into the grocery [warehouse] department seniority list at Gateway in accordancee with their seniority within the National employees group."

13. (a) Gateway and the Union signed another Agreement (see Exhibit J attached) respecting the Bakery Department employees which established their hourly rates of pay in conformity with the reductions provided in the Transition Agreement.

(b) This Agreement was signed by the Union on August 14, 1981, and by Gateway on November 12, 1981.

(c) This agreement contained a recital identical to that referred to above in ¶ 12(b).

14. The evidence in this record on whether or not Gateway is a successor to National's labor agreement establishes the following facts:

(a) Gateway hired 113 out of a possible group of 127 National employees. Fourteen of the 127 National employees did not report for available jobs at Gateway. Gateway's

Aldrich testified that the work force engaged by Gateway from the old National group was "substantially similar".

(b) There was no hiatus or lapse in production by the ex-National employees prior to or after their employment by Gateway.

(c) The supervisory staff remained substantially the same, with Gateway hiring all of the 8-10 National supervisors, one of whom was ultimately let go.

(d) There was no change in the nature of services rendered or job classifications of the National employees after their employment by Gateway.

(e) There was no substantial variation in the equipment used by the ex-National employees for Gateway.

(f) With respect to changes in method of operation, after July 9, 1981, Gateway consolidated certain functions formerly performed at Hopkins and Minneapolis to avoid duplication of functions. Specifically, fresh meat and produce were combined at the Hopkins location, and certain dry grocery items were combined at the Minneapolis location.

(g) With respect to customers served, some independent stores previously serviced by Gateway/Minneapolis were serviced out of Hopkins (in addition to the "National" and "Applebaum" stores); the quantum of work for the independents did not amount to more than 5-15%.

(h) There was no substantial change in the identity of suppliers to the warehouse.

(i) The was no change in the identity of the union representative.

(j) With respect to work location, after July 9, 1981 the more senior ex-National employees remained at Hopkins, the less senior being assigned to work at Gateway's Minneapolis warehouses. One year later, as of

July 9, 1982, 27 National/Hopkins warehousemen had been assigned to Minneapolis; 42 remained at Hopkins. The truck drivers were not considered domiciled at either Hopkins or Minneapolis, but commenced their work from either facility depending on the direction of their trip.

(k) At no time did ex-National employees hired by Gateway comprise a majority of Gateway's bargaining unit with IBT Local 544.

15. In December 1981, Gateway posted a number of jobs, held by ex-National employees at the Hopkins warehouse, as open for bidding by all Gateway employees; the seniority granted to Gateway employees over National employees by the Transition Agreement, and the expiration of the moratorium on job bidding for Hopkins jobs contained therein, resulted in the January 1982 displacement of approximately 10 ex-National employees who occupied premium-pay positions at Hopkins, and who, bumping down in turn, caused 10 Hopkins employees to be displaced and given employment at the Minneapolis facility. There were no subsequent job bids which caused the displacement of Hopkins employees after this date. (The principal applications of an employee's seniority relate to layoffs, job bidding (which includes shift preference), and vacation bidding sequence.)

16. On September 7, 1982, a PCB oil spill occurred at the Hopkins warehouse, causing the temporary closing of National's baking operation there and of Gateway's produce operation (Gateway's dry grocery operation continued). In October 1982 National permanently closed its bakery operation and Gateway also removed all its inventory from the Hopkins warehouse, assigning employees working there to

one or the other of its Minneapolis warehouses. Gateway has not utilized the Hopkins warehouse as a distribution facility since October 1982.

17. Thereafter, the bakery employees exercised their rights under §3.9 of the National-Union Local Addendum and the Gateway-Union agreement of July 22, 1981 (Exhibit I attached) and dovetailed into the ex-National warehousemen complement then employed by Gateway.

18. (a) During the fourteen-month period from July 6, 1981 to September 7, 1982, when National continued to operate its bakery department at the Hopkins warehouse, at no time did National ever exercise its option to "pass on to Gateway the responsibility for operating the bakery."

(b) The 10 employees in the bakery who were represented by the Union continued to perform the same employment duties during this fourteen-month period as they had performed for National before the National-Gateway transaction.

(c) From July 6, 1981 to September 7, 1982, the bakery employees had their time-cards turned in to Gateway and received their paychecks from Gateway.

(d) Gateway signed a reduced-wage agreement with the Union which recited that Gateway's agreement with National included the "Bakery Department" and stated that the employees therein were "being provided by Gateway." (See Exhibit J attached)

(e) Gateway billed National, and National paid to Gateway, all direct and indirect wage and benefit costs—such as wages, employer F.I.C.A., taxes, federal and state unemployment compensation taxes, workers' compensation insurance costs, health and welfare, pension, accrued vaca-

tion, and holiday costs—which Gateway had paid out to (or for the benefit of) the bakery employees.

(f) The 10 bakery employees were paid not at the rate National was paying them before the takeover transaction, but, rather, at the reduced rates prescribed in the Gateway-Union Transition Agreement.

19. All parties to this Stipulation reserve the right to refer to and argue the significance of, and interpretation of, any document hereinabove referred to and received in evidence; and where there is any conflict between the foregoing Stipulation and any document received in evidence, the document itself shall be controlling. Similarly, the parties reserve the right to cite and argue the significance of other facts established in this record which may not be contained in the foregoing Stipulation.

Dated at Saint Paul, Minnesota this 23rd day of April, 1986.

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Supreme Court, U.S.
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No. 87-444

In The

Supreme Court of the United States

October Term, 1987

RICHARD L. SMEGAL, MARVIN A. ROGERS, and RODNEY W. BOMSTAD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GATEWAY FOODS OF MINNEAPOLIS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, NATIONAL SUPER MARKETS, INC.,

Respondents.

BRIEF OF RESPONDENT NATIONAL SUPER MARKETS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED FOR REVIEW

The question presented in the Petition for Writ of Certiorari to United States Court of Appeals for the Eighth Circuit (the "Petition") is not worthy of review by this Court. The decision of the Court of Appeals for the Eighth Circuit in this case is fully consistent with decisions of this Court and is not of general significance to others. Consequently, further review is unwarranted.

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Respondents.

BRIEF OF RESPONDENT NATIONAL SUPER MARKETS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

The background of this case is set forth in the reported opinions of the Court of Appeals *Smegal, et al. v. Gateway Foods of Minneapolis, et al.*, 763 F.2d 354 (8th Cir. 1985) ("Smegal I") and 819 F.2d 191 (8th Cir. 1987) ("Smegal II") (Pet. App. A2-A12).

In *Smegal I,* the Court of Appeals affirmed the District Court granting summary judgment in favor of National Super Markets, Inc. ("National") and thus, dismissed National from the case. At the same time, the Court remanded the successorship claim against Respondent Gateway Foods of Minneapolis, Inc. ("Gateway") and Respondent Teamsters Local 544 ("the Union").

Upon remand, the plaintiffs, Gateway and the Union entered into a Stipulation of Facts on Successorship Issue (Pet. Appendix E) ("Stipulation"). National did not participate in the negotiation of this Stipulation, was not party to the action at the time this Stipulation was executed and is not a party to the Stipulation.

Subsequently, by agreement of the plaintiffs, Gateway and the Union, the District Court granted Gateway leave to file a third party complaint against National (Add. 1-3). Gateway then filed a third party complaint against National seeking indemnification.

After service of the third party complaint, National filed a motion to dismiss or, alternatively, to strike Gateway's third party complaint. This motion was heard at the same time as the summary judgment motion of Gateway and the Union. The District Court granted the summary judgment motion and ruled that, "Having determined that Gateway is not a successor to National, the Court will not reach National's motion to dismiss or alternatively to strike Gateway's third party complaint." (Pet. App. A-22 n.2.)

Although the plaintiffs appealed the District Court's order granting summary judgment in favor of Gateway and the Union, Gateway did not appeal the District Court's

ruling. In *Smegal II*, the Court of Appeals affirmed the District Court's decision in all respects.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The decision of the Eighth Circuit in *Smegal II* is consistent with decisions of this Court and with decisions of the other circuits. Indeed, this Court as recently as last Term in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. —, 96 L.Ed. 22, 107 S.Ct. — (June 1, 1987) has put to rest any lingering questions with respect to the successorship. This petition does not involve any important, unresolved question of federal law. The Court of Appeals decision here is fully consistent with the *Fall River* decision. It is unnecessary for the Court to revisit the successorship issue so soon after that decision.

CONCLUSION

The Petition for Writ of Certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Dated: October 12, 1987.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard L. Smegal, Marvin A. Rogers, and Rodney W. Bomstad, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Civil File No. 3-81-1105

ORDER GRANTING DEFENDANT GATEWAY FOODS OF MINNEAPOLIS, INC. LEAVE TO FILE THIRD PARTY COMPLAINT

Gateway Foods of Minneapolis, Inc., National Super Markets, Inc., and Over-The-Road, etc., Local No. 544, affiliated with the I.B.T., etc.,

Defendants.

Upon the annexed consent and stipulation of the attorneys for the respective parties and upon the motion of counsel for defendant Gateway Foods of Minneapolis, Inc., it is

ORDERED that defendant Gateway Foods of Minneapolis, Inc.'s motion for leave to file third party complaint is granted; and it is further

ORDERED that defendant Gateway Foods of Minneapolis, Inc. third party complaint be served upon counsel for plaintiffs and defendant union by mail and presented to the clerk of this court for issuance of a summons and for service of process on said National Super Markets,

Inc. in accordance with the Federal Rules of Civil Procedure; and it is further

ORDERED that the style of this action hereafter conform to that specified in the aforesaid third party complaint and that the clerk of this court is hereby ordered to mark his records in this case accordingly.

Dated: April 18, 1986

/s/ Paul E. Magnuson
United States District Judge

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing order granting defendant Gateway Foods of Minneapolis, Inc. leave to file third party complaint may be presented for signature to the judge presiding over the hearing of this action or to his magistrate and that any hearing on defendant Gateway Foods of Minneapolis, Inc.'s motion for leave to file third party complaint is hereby waived.

Dated this 7th day of April, 1986.

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